No. [redacted] 25

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

[redacted] B. GALLERSON

PETITION FOR A WRIT OF CERTIORARI TO THE [redacted] COURT OF APPEALS [redacted] CIRCUIT

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No. 577

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD B. CALDERON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals reversing respondent's conviction under Section 145(b) of the Internal Revenue Code.

OPINION BELOW

The opinion of the court below (R. 218-219) is reported at 207 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1953. (R. 220.) A petition for rehearing was denied on December 8, 1953 (R. 220), and, on January 5, 1954, the time for filing

this petition was extended by Mr. Justice Douglas to and including February 6, 1954. (R. 222). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether, in a tax evasion prosecution based on proof of unexplained increases in net worth, the defendant's admissions as to the amount of cash on hand at the starting point require corroboration.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Respondent was indicted on October 29, 1951, in the United States District Court for the District of Arizona on four counts of willful attempted evasion of his own and his wife's joint income tax liabilities for the years, respectively, 1946, 1947, 1948 and 1949, in violation of Section 145(b), Internal Revenue Code. (R. 3-6.) At the trial before a jury, the Government established the alleged unreported income for the four years involved by the "net worth" method. (R. 218.) The assets and liabilities included in the net worth statement were stipulated to be correct with the exception of the items of cash on hand and cash in the bank. (R. 218.) To establish the amount of cash in the bank, ledgers covering the defendant's two checking accounts and two saving accounts were placed in evidence on the testimony of bank officials. (R. 34-49.)

Special Agent Tucker testified that he and Deputy Collector Webb prepared the net worth computation. (R. 52.) He stated they had attempted to reconstruct the defendant's net worth at the close of each of the years 1943 through 1949. (R. 61.) This reconstruction was based upon the agents' examination of the defendant's several bank accounts (R. 51); such business records as the defendant furnished them (R. 52); his cancelled checks; his returns; the working papers used to prepare his returns; invoices furnished by the defendant; records maintained by various coin-machine manufacturing companies, located in various parts of the country; records of an automobile company in

Douglas; records of Cochise County; working papers of defendant's accountant; deeds furnished by defendant (R. 66); and returns filed by him in prior years (R. 122). The agents determined that as of December 31, 1945, the defendant had visible assets totaling $32,000. (R. 61.) Agent Tucker testified this total included all of the defendant's known assets. (R. 61.) On June 18, 1950, the agents discussed with the defendant his assets and liabilities for the years in question. (R. 56.) The defendant told them he had, as was his custom, approximately $500 currency on December 31, 1945. (R. 57-59.) He also informed the officers of his age, the number of his children, and his household expenses (R. 57, 67), and identified certain expenditures (R. 64). The defendant also told the agents he had not received any gifts or inherited any money. (R. 108.)

The defendant signed the net worth statements prepared by the agents stating he had read them and that they disclosed his true net worth on the items indicated. (R. 123-125.)

Deputy Collector Webb testified that, based upon the preceding net worth statements, the defendant received the following amounts of income during the prosecution years: 1946—$24,855.49 (R. 99); 1947—$11,056.82 (R. 111); 1948—$6,874.43 (R. 112); 1949—$19,506.73 (R. 112). The amounts of income reported by the defendant for those years were $3,836.68, $3,663.93, $3,590.73, and $5,683.80, respectively (R. 3-6). Mr. Webb computed the tax due on these amounts of income actually received

by the defendant. (R. 99, 103, 104.) He testified that all of his computations of income and taxes were based upon the net worth statements in question and that if the items of cash on hand were changed, his computations would be altered. (R. 122.) Mr. Webb identified a statement which the defendant signed under oath on August 2, 1950. (R. 106-110.) In this statement the defendant admitted the understatements of income discovered by the agents as having resulted from a scheme for diverting the receipts of his coin machines. (R. 108-109.)

The defendant took the stand and testified that about 1939 he started keeping money in a trunk at home (R. 156-157); that in 1944 or 1945 he transferred his money to a safe in his office (R. 163, 194); that by 1945 he had sixteen or seventeen thousand dollars in his safe (R. 164); that he used most of the currency to buy new machines in 1946 and the early part of 1947 (R. 165); that in the latter part of 1947, and in 1948 and 1949, he started to build up his currency again and had three to four thousand dollars in currency at the close of 1949 (R. 165). On cross-examination the defendant admitted that he testified in a prior trial he had eight or nine thousand dollars at the starting point. (R. 193-195.)

At the conclusion of the trial the defendant was found guilty on all four counts (R. 13-14); and on November 10, 1952, a total fine of $10,000 was imposed on counts 1 and 4 and probation for a period of three years was imposed on counts 2 and 3. (R. 14-17.) An appeal was taken to the Court of Appeals for the Ninth Circuit and on October 9, 1953,

the Court of Appeals reversed the conviction and ordered a new trial. (R. 220.) The principal ground for the decision was that the defendant's admissions as to the amount of cash which he had on hand at the starting point, i.e., December 31, 1945, could not support the conviction, in the absence of "some independent proof of the corpus delicti" (R. 219.)

REASONS FOR GRANTING THE WRIT

As this Court stated in *United States* v. *Johnson*, 319 U.S. 503, 517, in tax evasion cases where the defendant has engaged in multitudinous financial transactions of which he kept no adequate records, it is not to be expected that understatement of income can be shown by direct proof of the individual income-producing transactions. In such cases the customary method of proof consists in showing an increase in the defendant's net worth during the year substantially in excess of his reported income plus non-income receipts like gifts and bequests.

The use of the net worth method of proof (which has universally been sustained by the Courts of Appeals, see Brief for the United States in *Remmer* v. *United States*, No. 304, this Term, pp. 41-42) depends upon the establishment of a starting point, at the beginning of the tax period involved, at which all of the defendant's known assets are computed. An essential item in such computation is, of course, the amount of cash which the defendant had on hand at that time. Ordinarily, this amount rests within the private knowledge of the defendant, and any effort by the Government to prove the exact

amount involves inherent difficulty. In the present case, however, that amount was established by the defendant's own admissions—which would seem to be the best and most reliable form of proof. Nevertheless, the Court of Appeals for the Ninth Circuit held in this case that such admissions could not, in the absence of corroboration, support the conviction. The Government submits that this ruling is erroneous; that it is in conflict with decisions in other Courts of Appeals; and that, unless reviewed and reversed by this Court, the decision below constitutes a substantial obstacle to the effective enforcement of the provisions of the internal revenue laws proscribing fraudulent tax evasion.

1. The rule requiring that confessions and admissions be corroborated is a safeguard against the possibility of erroneous convictions based entirely on untrue or improbable confessions or admissions. *Warszower* v. *United States*, 312 U. S. 342, 347. It is held by some courts to apply also to admissions as to some essential element of the crime charged. *Forte* v. *United States*, 94 F. 2d 236 (C.A.D.C.). The decision below appears to be an unwarranted extension of this rule. The amount of cash on hand is not in itself either the *corpus delicti* or an essential element of the offense of willful tax evasion. A conviction could not rest on such an admission alone. Without other evidence establishing that income received was not reported, the cash item would be meaningless. Proof of an admission as to cash on hand at the beginning point, without independent corroboration, thus does not involve any

danger against which the corroboration rule is a safeguard. Cf. *Warszower* v. *United States*, *supra*; Wigmore, *Evidence*, (3d ed.), Vol. III, Section 821(3), Vol. VII, Section 2074.

2. The decision below is squarely in conflict with *Bell* v. *United States*, 185 F. 2d 302 (C.A. 4), certiorari denied, 340 U.S. 930. In that case the Court of Appeals for the Fourth Circuit noted that the amount of cash on hand at the starting point "was small, according to Bell's statement * * *." (185 F. 2d, 302, 308.) Bell had contended, *inter alia*, that "the government's case against him consists of the net worth statements and his own admissions" and "must fall on the ground that the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant." (*Supra*, p. 309.) This argument was flatly rejected. Contrary to the reasoning of the court below, the Court of Appeals for the Fourth Circuit stated (*ibid.*):

> This argument assumes that the net worth statements in themselves furnish no substantial evidence whatsoever of the corpus delicti in this case; but this is not true, as we have seen. Moreover, the rule does not require that the corpus delicti be completely shown by evidence aliunde defendant's confessions, but admits the confessions where other substantial evidence of the crime is shown, and thereupon both the statements of the defendant and the independ-

> ent evidence must be taken into consideration by the jury in determining whether guilt is proven beyond a reasonable doubt. * * *
>
> In this case there is substantial evidence outside of Bell's statements to indicate his guilt. It consists of the increase in his net worth during the taxable years, the absence of personal records or books of account, and the inadequacy of the corporate records to show fully either its transactions or those of the defendant; * * *.

In the instant case, there was similar independent evidence (summarized *supra*, pp. 3-5) showing a failure to report income received.

The decision below is also inconsistent in principle with holdings in other circuits that the Government can make a prima facie showing of understatement of income without necessarily presenting evidence as to the exact amount of cash on hand at the starting point. *Gariepy* v. *United States*, 189 F. 2d 459, 463 (C.A. 6); *Schuermann* v. *United States*, 174 F. 2d 397 (C.A. 8), certiorari denied, 338 U.S. 831; *Leeby* v. *United States*, 192 F. 2d 331 (C.A. 8); *Remmer* v. *United States*, 205 F. 2d 277 (C.A. 9), pending on writ of certiorari, No. 304, this Term; *Holland* v. *United States*, decided by the Court of Appeals for the Tenth Circuit on January 21, 1954, 54-1 U.S.T.C., C.C.H. ¶ 9177. The reasoning of these cases is that the existence and amount of cash on hand are peculiarly within the knowledge of the defendant, and that his failure to present such evidence should not overcome an otherwise convincing showing of understatement of

income. These cases represent an application of the general rule stated in *Rossi* v. *United States*, 289 U.S. 89, 91-92, that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could readily be disproved by the production of documents or other evidence probably within the defendant's possession or control." Accord: *United States* v. *Fleischman*, 339 U.S. 349, 360-364; *Morrison* v. *California*, 291 U.S. 82, 88-91; *Casey* v. *United States*, 276 U.S. 413, 418; *Yee Hem* v. *United States*, 268 U.S. 178, 185; *Wilson* v. *United States*, 162 U.S. 613, 619.

CONCLUSION

The decision below is erroneous and out of harmony with rulings in other circuits. It presents a question of substantial importance in the enforcement of the penal provisions of the revenue laws. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

FEBRUARY 1954.

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